SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

WHEATON BRASS WORKS, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY

ON PETITION FOR A WRIT OF CERTIORAI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1950

No. 666

SOUTHERN PACIFIC COMPANY, Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a Corporation of the State of New Jersey, Defendant-Respondent

ORDER OF CERTIFICATION—Filed November 16, 1950

Pursuant to Rule 1:5-1 it is ordered that the appeal from the judgment entered in this cause on March 10, 1950, in the Essex County District Court, now pending in the Superior Court, Appellate Division, be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

Order that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

Ordered that all papers necessary to be filed in the cause by the parties hereto in the prosecution of this appeal, down to and including the issuing of mandate, shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

Dated November 16, 1950.

By the Court, Arthur T. Vanderbilt, Chief Justice.

[File endorsement omitted.]

[fol. 2l]

Appendix to Appellant's Brief

AGREED STATEMENT IN LIEU OF RECORD.

Richard F. Green, attorney for Southern Pacific Company, plaintiff-appellant, and Roy C. Collins, attorney for Wheaton Brass Works, defendant-respondent hereby agree that the following statement shall be presented to and used by the Court in lieu of record on appeal, pursuant to Rule 1:2-22:

1. This is a civil action instituted in the Essex County District Court to recover transportation charges on a certain railroad shipment, the facts as between the parties prior to suit being more fully set forth in a certain Stipulation of Facts, copy of which is annexed hereto, and the original of which was presented to the Judge of the Essex County District Court for use by him in lieu of the submission of evidence by the testimony of witnesses.

2. The action was started on June 16, 1949.

3. In the proceedings in the Essex County District Court, neither party adduced evidence in addition to that set forth in the stipulation of facts, and the matter was presented and disposed of on the basis of cross motions for judgment on the facts set forth and agreed to in said stipulation, after argument and the submission of briefs.

4. The aforesaid stipulation of facts is annexed hereto and made a part hereof.

5. On March 3, 1950 Hon. Joseph G. Lyons advised counsel of his determination favor of the defendant Wheaton Brass Works, by letter, copy of which is annexed hereto and made a part hereof.

[fol. 2m] 6. Judgment was actually entered in the Essex County District Court in favor of the defendant and against the plaintiff on March 10, 1950.

7. The point relied on by the plaintiff-appellant herein is that under the law applicable to the stipulated facts the plaintiff-appellant was and is entitled to judgment against the defendant-respondent.

8. Defendant-respondent hereby waives the filing by the plaintiff-appellant of deposit for costs under Rule 1:2-15.

Richard F. Green, Attorney for Plaintiff-Appellant.
Roy C. Collins, Attorney for Defendant-Respondent.

The foregoing Agreed Statement in lieu of record, is hereby approved this 1st day of May, 1950.

Joseph G. Lyons, Judge, Essex County District Court.

[fol. 2n] STIPULATION OF FACTS

It is hereby stipulated and agreed by and between Richard F. Green, Esq., Attorney of the plaintiff, and Roy C. Collins, Esq., Attorney of the defendant, that the above entitled cause be submitted to the court for its determination without a jury on the following statement of facts:

1. On or about June 1, 1947, the Officer in Charge, Construction Battalion Center, Port Hueneme, California, as agent for Bernard Pipe Supply delivered to plaintiff's agent at Oxnard, California, for transportation to defendant at Newark, New Jersey, certain property described in the bill of lading as "291 BXS Pipe Fittings, NOIBN, I/S". The said agent collected prepaid charges of $1,082.42 on the basis of the applicable tariffs and schedules of the Interstate Commerce Commission.

2. The abbreviation "I/S" is accepted among carriers as meaning "Iron and Steel", but this fact was not known to defendant when it accepted delivery of said property.

3. The defendant knew that the shipment consisted partly of brass but did not know at the time of acceptance of delivery of said shipment that the bill of lading incorrectly described the shipment for rate classification or other purposes.

4. In fact the said shipment was determined by the Pennsylvania Railroad Co., the carrier at destination, to consist of iron and steel pipe with fittings and brass valves; on the basis of the tariffs and schedules applicable to such merchandise the Pennsylvania Railroad Co. charged against plaintiff railroad an additional sum of $716.86 for freight and $21.51 for taxes or a total of $738.37.

[fol. 2o] 5. On May 16, 1947 the defendant entered into a contract of sale with Bernard Pipe Supply of Los Angeles, California, to purchase 291 boxes of loading assemblies, being the property described in paragraphs 1 and 2 of this stipulation.

6. By the terms of its contract of sale said loading assemblies were to be delivered to defendant at Newark, New

Jersey, shipping charges prepaid by the seller, Bernard Pipe Supply.

7. Prior to the arrival of the goods in Newark, New Jersey, the defendant received in the mail from the seller in California an invoice for the purchase price of the goods at the contract price and indicating thereon that the goods had been shipped f. o. b. Newark, New Jersey, with shipping charges prepaid by the seller.

8. Enclosed with the invoice was a uniform straight bill of lading, copy of which is annexed, indicating that freight charges were to be collected.

9. Shortly thereafter defendant received an arrival notice from the Pennsylvania Railroad Co. indicating that the goods had arrived at its freight station in Newark and could be picked up there. Said arrival notice also indicated that freight charges had been prepaid.

10. Because of the inconsistent statements on the sellers invoice and the Pennsylvania Railroad Company's arrival notice as compared with the bill of lading, defendant before accepting delivery of the goods or paying the shipper for the same, communicated with the Pennsylvania Railroad Co. and inquired concerning shipping charges explaining that by its contract with the shipper the latter was to pay shipping charges; that the shipper's invoice indicated shipping charges had been paid in full; that the Pennsyl-
[fol. 2p] vania Railroad Co.'s arrival notice also indicated that shipping charges had been paid in full; that the bill of lading issued by the Plaintiff indicated that shipping charges were to be collected; that by reason of its contract with the seller it did not wish to accept delivery of the goods or pay the seller for the same until it knew whether there were any shipping charges payable.

11. The Pennsylvania Railroad Co. informed defendant that shipping charges had been prepaid in full.

12. In reliance upon this representation by the Pennsylvania Railroad Co. defendant accepted delivery of the goods on June 17, 1947 from the Pennsylvania Railroad Co. and paid the shipper, Bernard Pipe Supply of Los Angeles, California, the full contract price therefor.

13. In December of 1948 or January of 1949 a representative of the Pennsylvania Railroad Co. called on defendant and inquired concerning the nature of this shipment and for a description of the property included therein.

14. Defendant described said merchandise to said representative who thereupon informed defendant that the goods had been improperly classified by the shipper, as a result of which there were additional freight charges due and payable.

15. Whereupon defendant informed said representative that by the terms of its contract with the shipper it was the shipper and not it who was liable for freight charges, exhibiting its contract with the shipper to said representative in substantiation of its contention and informing said representative that any unpaid freight charges would have to be collected by his company from the shipper.

[fol. 2q] 16. Thereupon said representative left defendant's place of business without further demand.

17. Except as set forth in paragraph 14, the plaintiff and the Pennsylvania Railroad Co. had never at any time made any claim or demand on defendant for payment of shipping charges or any portion thereof in connection with said shipment until the filing of the complaint herein.

18. Defendant had no knowledge until served with the complaint herein of the amount of shipping charges paid by the shipper.

19. Defendant had accepted delivery of said goods, had paid the shipper in full therefor and had resold substantially all of said goods before it was informed by the representative of the Pennsylvania Railroad Co. as set forth in paragraph 14 hereof that there was any claim or demand for additional shipping charges.

20. The shipper, Bernard Pipe Supply, is now and was on the date of the commencement of this suit in business in Los Angeles, California, and is solvent.

21. Plaintiff has made no effort to collect the shipping charges, referred to in paragraph 4 hereof, from the shipper, Bernard Pipe Supply.

22. The parties, respectively, reserve the right to adduce any additional evidence, not inconsistent herewith, and further reserve the right to move for judgment on the basis of the facts herein set forth.

Richard F. Green, Attorney for Plaintiff. Roy C. Collins, Attorney for Defendant.

[fol. 2r] THE ESSEX COUNTY DISTRICT COURT

OPINION LETTER—March 3, 1950

GENTLEMEN:

This matter was submitted to the Court for decision on an agreed state of facts and briefs.

After a consideration of the facts and briefs of counsel, the Court cannot find that the consignee herein, the defendant, either factually or legally is primarily or secondarily liable. It seems to the Court that the case at bar is governed by the principles enunciated by Mr. Justice Brandeis in the case of Louisville and Nashville R. R. Co. vs. Central Iron and Coal Co., 265 U. S. 59, wherein he held that the tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract subject to the rule which prohibits discrimination. He held, further, that to ascertain what contract was entered into we look primarily to the bill of lading.

From the stipulated facts it is apparent that the consignee did not promise either expressedly or by implication to pay these freight charges. As a matter of fact, it refused to pay them and inquired what the correct amount was before accepting the shipment.

Counsel for the plaintiff states, in his memorandum, if a consignee accepts a shipment he becomes liable as a matter of law for the full amount of the freight charges and cites in support of this contention, Pittsburgh vs. Fink, 250 U. S., 577, Louisville vs. Central Iron and Coal Co., *supra*, and Louisville vs. U. S., 267, U. S., 395. None of these cases [fol. 2s] in the Court's opinion stands for the bold assertion which counsel makes.

In the Fink case the consignee was to pay for the shipment and did pay for the shipment but, under a mistake, paid less than the tariff requirement.

In the Louisville vs. U. S. case it is therein stated that the general rule is that if a consignee accepts a shipment he becomes liable as a matter of law for the full amount of the freight charges. This case and the Fink case must be read in the light of the Louisville and Nashville R. R. Co. vs. Central Iron and Coal Co. case, which holds that liability only arises as a result of an agreement to pay, either expressedly or impliedly.

Judgment, therefore, will be entered in favor of the defendant, Wheaton Brass Works, and against the plaintiff, Southern Pacific Company.

Respectfully yours, Joseph G. Lyons, Judge.

JGL.F.

[fols. 2t-2u] NOTICE OF APPEAL

Notice is hereby given that the plaintiff Southern Pacific Company appeals to the Superior Court of New Jersey, Appellate Division, from the final judgment of the Essex County District Court entered in favor of the defendant in this action on March 10, 1950.

Dated: March 28, 1950.

Richard F. Green, Attorney for Plaintiff.

Service of a copy of the above Notice of Appeal is hereby acknowledged this 28th day of March, 1950.

Roy C. Collins, Attorney for Defendant.

(Here follows 1 Photolithograph, side folio 2v)

(Uniform Domestic Straight Bill of Lading, adopted by Official, Southern, Western and Illinois Classification Territories, March 15, as amended August 1, 1930, and June 15, 1941.)

1st SHEET

UNIFORM STRAIGHT BILL OF LADING

ORIGINAL—NOT NEGOTIABLE

Shipper's No. 27990

NO CAR ORDERED
NO CAR FURNISHED
CT

Agent's No.

VENTURA COUNTY RAILWAY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

at PORT HUENEME, CALIFORNIA 28 MAY 1947

from OFFICER IN CHARGE, ABD, CONSTR BATT CENTER

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to THE WEATON BRASS WORKS (Mail or street address of consignee—For purposes of notification only.)

Destination NEWARK State of NEW JERSEY County of

Route WC SP LOS ANGELES UP CNW NYC

Delivering Carrier Car Initial SOU Car No. 22423

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
291 BXS	PIPE FITTINGS, NOIBN, I/S (LOADING ASSEMBLY) CU FT 2037	71,305		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make

PAGES BOND VERTICAL

NOT CAR FURNISHED

VENTURA COUNTY RAILWAY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

at PORT HUENEME, CALIFORNIA 28 MAY 1947

from OFFICER IN CHARGE, ABD, CONSTR BATT CENTER

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to THE WEATON BRASS WORKS

Destination NEWARK State of NEW JERSEY County of

Route VC SP LOS ANGELES UP CNW NYC

Delivering Carrier Car Initial SOU Car No. 22423

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
	CU FT			
291 BXS	PIPE FITTINGS, NOIBN, I/S 2037 (LOADING ASSEMBLY)	71,305		
	INVOICE #'S 118848----5406232 118859----5406225 118860----5406226 118862----5406228 118863----5406229 118861----5406227 118864----5406230 "ODT GENERAL ORDER 18A COMPLIED WITH"			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. OINC, ABD, CBC, B.W. FINK CAPT., (CEC)USN

(Signature of Consignor.)

If ~~BY DIRECTION~~ prepaid, write or stamp here, "To be Prepaid."

"COLLECT"

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$_____

The requirements of General Order O.D.T. 18 have been complied with in the loading of this shipment, except as authorized by:

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per

OINC, ABD, CONSTR BATT CENTER
B. W. FINK, CAPT., (CEC)USN Shipper.

Per BY DIRECTION

Agent

Per

Permanent Postoffice address of shipper

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

2V

PAGES BOND VERTICAL

Contract Terms and Conditions

[fols. 2w-3] Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate

destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of

lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

[fol. 4] SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM 1950

No. A 43

SOUTHERN PACIFIC COMPANY, Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a Corporation of the State of New Jersey, Defendant-Respondent

OPINION—December 4, 1950

Argued November 20, 1950 Decided ——

On Appeal from the Essex County District Court

Mr. Richard F. Green argued the cause for the appellant.
Mr. Roy C. Collins argued the cause for the respondent.

The opinion of the court was delivered by
BURLING, J.

This is an appeal by the plaintiff from a judgment of the Essex County District Court in favor of the defendant. The case was submitted to the District Court upon the pleadings and an agreed state of facts and briefs. The notice of appeal is addressed to the Superior Court, Appellate Division, but has been certified on our own motion.

The only issue involved is one of law. The question to be determined is whether a common carrier may, under the Interstate Commerce Act, recover from a consignee the balance of the freight charges on an interstate shipment where the consignor misdescribed the goods in a bill of lading and prepaid the freight at a lower rate than that provided in the filed tariffs for the goods actually shipped, the consignee having refused to accept the shipment until [fol. 5] assured that the freight was prepaid, and having changed his position in reliance on such representation.

The pertinent facts, as they appear in the stipulation of the parties, are that on May 16, 1947, the defendant entered

into a contract with Bernard Pipe Supply, of Los Angeles, California, for the purchase of 291 boxes of loading assemblies, by the terms of which contract the seller was to prepay the shipping charges. On or about June 1, 1947, the Officer in Charge, Construction Battalion Center, Port Hueneme, California, as agent of the seller, delivered the said assemblies to the plaintiff's agent at Oxnard, California, for shipment to the defendant, at Newark, New Jersey. The assemblies were described in the bill of lading as "291 BXS Pipe Fittings, NCIBN, I/S". The abbreviation "I/S" is accepted among carriers as meaning "Iron and Steel". The shipment actually consisted of iron and steel pipe with fittings and brass valves. The shipper's agent prepaid the plaintiff's agent charges of $1082.42 on the basis of tariffs and schedules of the Interstate Commerce Commission applicable to shipments of iron and steel. The defendant received from the seller an invoice for the price of the goods which indicated that the shipping charges had been prepaid. Enclosed with the invoice was a uniform straight bill of lading indicating that the freight charges were to be collected from the consignee. The defendant also received a notice from the Pennsylvania Railroad Co., the terminal carrier, indicating that the goods had arrived at its Newark freight station and that the freight charges had been prepaid. In view of the conflicting statements on the invoice, the arrival notice and the bill of lading the defendant contacted the Pennsylvania Railroad Co., advising that it did not wish to accept the goods until it knew whether [fol. 6] there were any shipping charges payable and being informed that the shipping charges had been fully prepaid accepted the goods and paid the shipper the full contract price therefor. At the time of such acceptance the defendant knew that the shipment consisted partly of brass but did not know the meaning of the abbreviation "I/S" on the bill of lading. Approximately 18 months after the acceptance of delivery by the defendant, and after substantially all of the goods had been resold, a representative of the Pennsylvania Railroad Co. discussed the shipment with the defendant, and, upon being apprised of the nature of the goods, informed the defendant that the goods had been improperly classified by the shipper as a result of which additional freight charges were due. The defendant informed said representative that any unpaid freight charges

would have to be collected by the railroad from the shipper as under the defendant's contract with the shipper the latter was liable therefor. The plaintiff has made no effort to collect the unpaid balance of the shipping charges from the shipper, which is still in business and solvent, but instituted the present suit on June 16, 1949, against the defendant to collect such unpaid charges in the amount of $738.37. The Essex County District Court decided that under the foregoing facts the defendant was under no liability to the plaintiff and judgment in favor of the defendant was accordingly entered on March 10, 1950. The present appeal is from that judgment.

The shipment giving rise to the present controversy is of an interstate nature and a determination of the question involved requires a consideration of the applicable provisions of the Interstate Commerce Act as construed by the Federal courts whose decisions on federal problems are controlling. The pertinent provisions of the Interstate Commerce Act are contained in Title 49, U. S. C. A., sec. 6, [fol. 7] par. (7) (Act Feb. 7, 1887, c. 104, sec. 6, par. 4, 24 Stat. 381, as amended Act March 2, 1889, c. 382, sec. 1, pars. 4, 7, 25 Stat. 856, 857, Act June 29, 1906, c. 3591, sec. 2, sec. 6, par. 6, 34 Stat. 587, Act Feb. 28, 1920, c. 91, sec. 411, sec. 6, par. 6, 41 Stat. 483) as follows:

> "No carrier . . . shall engage . . . in the transportation of property . . . unless the rates . . . and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of . . . property . . . between the points named in such tariffs than the rates . . . and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates . . . and charges so specified . . . ".

The foregoing section of the Act has been construed on numerous occasions by the federal courts and it has become well settled that the purpose of the Act is to prevent preferences and to enforce compliance with the requirements of the pertinent paragraph that a carrier shall not charge

less than the rates specified in his filed schedules, and that it is the right and duty of the carrier to collect the full tariff charges for freight delivered. Nor can any act or omission on the part of the carrier, except the running of the statute of limitations, estop or preclude the carrier from recovering the full amount of the proper charges from a person liable therefor, the parties to the consignment being, as a matter of law, charged with the proper schedule rates. See annotation, Title 49, U. S. C. A. sec. 6, par. (7), p. 284. One of the objectives of the Act is to prevent discrimination by carriers in their rates in favor of preferred shippers and to stabilize rates beyond the control of the carrier and the persons liable therefor. Failure by a carrier to collect the proper charges cannot release [fol. 8] a person liable therefor as this would circumvent the purpose of the Act and be in defiance of its provision forbidding a remission "in any manner or by any device any portion of the rates . . . and charges so specified." The application of the Act, as construed by the courts, leads occasionally to a seemingly harsh result as is alluded to in *Pittsburgh, C. C. & St. L.R. Co.* v. *Fink*, 250 U. S. 577, 63 L. ed. 1151 (1919), a leading case on the subject. In that case, a carrier delivered merchandise to the consignee, one Fink, upon payment by the latter of the sum of $15., being the amount specified in the waybill. The filed tariff rates so classified the merchandise that the charges should have been $30. Suit was instituted by the carrier for the difference and recovery was allowed. The rule was stated by Mr. Justice Day as follows:

> ". . . The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier turned over the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances, consistently with the provisions of the Interstate Commerce Act, the consignee was only entitled to the merchandise when he paid for the transportation thereof the amount specified as re-

quired by the statute. For the legal charges the carrier had a lien upon the goods, and this lien could be discharged and the consignee become entitled to the goods only upon tender or payment of this rate. Texas & P.R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. This may be in the present as well as some other cases a hardship upon the consignee, due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship cannot change the policy which Congress has embodied in the statute [fol. 9] in order to secure un-formity in charges for transportation."

It was further decided in the *Fink* case that the defendant could not invoke the principle of estoppel against the carrier's right to collect the legal rate as "Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute." In *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249, 90 L. ed. 47, 52 (1945), in referring to the doctrine of estoppel, Mr. Chief Justice Stone cited the *Fink* case and said:

> "For no more than private contract can estoppel be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest."

The principle fixing the liability of the consignee, as established in the *Fink* case, *supra*, has been followed by numerous federal and state courts, including the courts of this state. Some of the many federal cases following the established rule are *Louisville & N.R. Co.*, v. *Central Iron & Coal Co.*, 265 U. S. 59, 68 L. ed. 900 (1924); *Illinois Steel Co.* v *Baltimore & Ohio R. Co.* 320 U. S. 508, 88 L. ed. 259 (1944); *Central Warehouse Co.* v. *Chicago, R.I. & P. Ry. Co.*, 14 F. 2d 123 (D. C. Minn.) aff'd. 20 F. 2d 828 (C. A. 8th Circuit 1927); *F. Burkhart Mfg. Co.* v. *Fort Worth & D.C. Ry. Co.*, 149 F. 2d 909 (C. C. A. 8th Circuit 1945); *Great Northern Ry. Co.* v. *Hyder*, 279 F. 783, (D. C. W. D. Wash. S. D., 1922); *Western & Atlantic R. Co.* v. *Under-*

wood 281 F. 891 (D. C. N. D. Ga. 1922). The cases in New Jersey following the principle so established are *West Jersey etc. Co.* v. *Lake & Risley Co.*, 105 N. J. L. 314 (Sup. Ct. 1929); *Atlantic City R.R. Co.* v. *Packman*, 7 N. J. Misc. 945 (Sup. Ct. 1929); *N.Y. Central R.R. Co.* v. *Stanziale*, 105 N. J. L. 593 (E & A 1929). See also *New York, N.H. & H.R. Co.* v. *Lord & Spencer, Inc.*, 273 Mass. 583, 174 N. E. [fol. 10] 179 (Sup. Jud. Ct. 1931); 13 C. J. S., Carriers, sec. 393, p. 873; 9 Am. Jur. Carriers, sec. 624, p. 794; 83 A. L. R. 249. The rule was recognized in *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 83 L. ed. 953, 957 (1939), rehearing denied, where the court gave expression to a reason for the seemingly harsh rule by saying:

> ". . . This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collecting of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be reviewed with the same disapproval as voluntary rebates."

The defendant contends that its liability must be predicated on a contract to pay the shipping charges and that since in the present case the defendant consignee had informed the carrier, prior to acceptance of the goods by the defendant, that the shipping charges were to be paid by the shipper and that it, the defendant consignee, would not assume liability therefor there was no contract by the defendant to pay the charges and hence no liability on its part. It is said that while in the *Fink* case, *supra*, the consignee paid less than the proper charges at the time the goods were delivered, the defendant herein refused to accept delivery until assured that all charges had been prepaid. But this would seem to be immaterial in view of the rule as stated in the *Fink* case, *supra*, and so often followed by the courts, as earlier indicated herein. In *Great Northern Ry. Co.* v. *Hyder*, *supra*, the following question was presented for determination: "Can a consignee, who is not at any time the owner of the goods shipped, who has not agreed with either the shipper or the carrier that he will pay the freight, who accepts the goods upon the carrier's representation that the freight has been prepaid,

be bound by such acceptance to pay the freight?" The Court answered the question in the affirmative, saying:

> [fol. 11] ". . . If the doctrine of estoppel cannot be invoked where the consignee paid the demanded rate, thinking it was the filed and posted rate, the carrier thereby losing its lien for the unpaid portion of the freight, it is not perceived why the consignee, in receiving the goods, acting under a mistaken belief that the shipper had fully paid the freight, can do so . . ."

and further saying:

> ". . . The shipper, the carrier, and the consignee are all agents and trustees for the public, and no complications arising out of the agreements between them, or shuffling, should defeat the purpose of the act requiring the full and exact payment of the freight as fixed by the filed, posted and published tariff."

A similar result was reached in *Western & Atlantic R. Co.* v. *Underwood supra,* wherein the court used the following cogent language:

> ". . . That the consignee cannot accept delivery without incurring liability for the carrier's charges, known or unknown, supposed to be prepaid or otherwise, and no matter what the consignee's actual relation to the shipper is, appears a harsh rule, but is seemingly established by authority. If by the shipper's omission the consignee is thus made liable for a charge which as between him and the shipper should not be borne by him his recourse is on the shipper. The carrier is not bound by their private rights in the transaction, whether known or unknown to it, nor by any mistake or misrepresentation occurring, but under the law may look to the shipper as the original contractor to pay and to the person who as consignee accepts the goods and becomes by statute liable to discharge the lien thereon until the lawful charges are satisfied."

The defendant seeks support for its position in the cases of *Louisville & N.R. Co.* v. *Central Iron & Coal Co. supra, Central R.R. Co.* v. *MacCartney,* 68 N.J.L. 165 (Sup. Ct. 1902) and *Penna. R.R. Co.* v. *Townsend,* 90 N.J.L. 75 (Sup. Ct. 1917). The two New Jersey cases are not help-

ful to the defendant. Our former Supreme Court, in 1929, in *West Jersey etc. Co.* v. *Lake & Risley Co., supra,* followed the rule of the *Fink* case, and referred specifically to the *MacCartney* and *Townsend* cases as follows:

> [fol. 12] "The cases cited were, however, dealing solely with the common law liability and none other. There is no reference to any statutory authority, nor, so far as appears, was the act of Congress called to the court's attention. Plaintiff in the present cases bases its right to recover not on the common law but on the act of Congress of February 4th, 1887, known as the Interstate Commerce Act, and its amendments. The question before us is, therefore, a federal and not a state problem, and is controlled by the decisions of the federal courts which as we think have ruled adversely to the respondent's contention."

We find nothing in *Louisville & N.R. Co.* v. *Central Iron & Coal Co., supra,* to support the defendant's position. That case involved a suit by the carrier against the shipper for the difference between the amount of charges originally incorrectly computed and paid by the consignee and the proper amount which was legally payable. The bill of lading in that case, as here, stated that the charges should be paid by the consignee. The court considered the bill of lading as the contract and decided that the *shipper* was not liable and that action should have been brought against the consignee. Mr. Justice Brandeis, speaking for the court, said that the Interstate Commerce Act did not impose an absolute obligation upon a *shipper* to pay the freight charges, and that the carrier and *shipper* "were left free to contract, subject to the rule which prohibits discrimination." But in concluding his opinion, Mr. Justice Brandeis said:

> "For, under the rule of the Fink case, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later. His liability satisfies the requirements of the Interstate Commerce Act."

The rule of the foregoing case appears to be that while the shipper has some latitude in limiting his liability by his

contractual undertaking, "if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full [fols. 13-14] amount of the freight charges." The *Central Iron & Coal Co.* case has been subsequently construed by the federal courts to impose an absolute liability on the consignee resulting from the acceptance of the goods. *Central Warehouse Co.* v. *Chicago, R.I. & P. Ry Co.* (C.C.A. 8th Circuit 1927) *supra; F. Burkhart Mfg. Co.* v. *Fort Worth & D.C. Ry Co.,* (C.C.A. 8th Circuit 1945), *supra.*

The judgment is reversed and the trial court is directed to enter judgment for the plaintiff in the amount of its claim, together with lawful interest thereon from the date of acceptance of delivery.

[fol. 15] SUPREME COURT OF NEW JERSEY

Check List

No. A-43

September Term, 1950

On appeal from Essex County District Court.

SOUTHERN PACIFIC COMPANY, Plaintiff-Appellant,

and

WHEATON BRASS WORKS, Defendant-Respondent.

Decided December 4, 1950.

The Chief Justice presiding.

Opinion by Burling, J.

CHECK LIST	Affirm	Reverse	Modify	Concur in Result
The Chief Justice.....	1			
Mr. Justice Case		1		
Mr. Justice Heher		1		
Mr. Justice Oliphant		1		
Mr. Justice Wachenfeld ..	1			
Mr. Justice Burling		1		
Mr. Justice Ackerson		1		
Totals.....	2	5		

[fo'. 16] SUPREME COURT OF NEW JERSEY

Appeal Docket No. 666

SOUTHERN PACIFIC COMPANY, Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a corporation of the State of New Jersey, Defendant-Respondent.

Civil Action On Appeal

Mandate on Reversal—Dec. 4, 1950

This cause having been duly argued before this Court by Mr. Richard F. Green, counsel for the appellant and Mr. Roy C. Collins, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Essex County District Court is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Essex County District Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 4th day of December, 1950.

Filed Dec. 4, 1950, Charles K. Barton, Clerk.

Charles K. Barton, Clerk of the Supreme Court

A true copy, Charles K. Barton, Clerk.

[fol. 17] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 18] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1950

[Title omitted]

STIPULATION AS TO PRINTING

The parties to the above-entitled cause hereby stipulate that there shall be deleted from the record to be printed by the Clerk of the Supreme Court of the United States, all of the printed material set forth on a photostatic copy of the back or reverse side of the bill of lading and a printed facsimile thereof, both of which are entitled "Contract Terms and Conditions", and which appear opposite page 10a in the Brief and Appendix for Appellant in the court below, except that portion of Section 7 thereof which reads as follows:

> "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property;. . . . The consignor shall be liable for the freight and all other lawful charges except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, [fol. 19] contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. . . . If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Roy C. Collins, Counsel for Petitioner; Richard F. Green, Counsel for Respondent.

Dated: February 14, 1951.

Office-Supreme Court, U.S.
FILED
FEB 28 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 583.

WHEATON BRASS WORKS, a corporation of the State of New Jersey,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND SUPPLEMENTAL APPENDIX.

ROY C. COLLINS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.....

WHEATON BRASS WORKS,
a corporation of the State of New Jersey,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Wheaton Brass Works, the petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in the above-entitled case on December 4, 1950.

Opinions Below.

The memorandum opinion of the Essex County (New Jersey) District Court (R. 6) is unreported. The opinion of the Supreme Court of New Jersey (R. 11) is reported in 5 N. J. Reports 594.

Jurisdiction.

The judgment of the Supreme Court of New Jersey was entered on December 4, 1950 (R. 20). Jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3), (June 25, 1948, c. 646, 62 Stat. 929) and 28 U. S. C., Section 2101(c), (June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, Sec. 106, 63 Stat. 104). Respondent sued the petitioner to recover the amount of an undercharge for freight ($738.37) on a shipment of goods from California to New Jersey (R. 2, 3). The undercharge resulted from a misdescription of the goods by the shipper (R. 3). The amount sued for represented the difference between the amount of freight charged, and paid by, the shipper pursuant to the tariffs applicable to the shipment as described by the shipper and on file with the Interstate Commerce Commission, and the amount properly payable under the filed tariffs applicable to the actual goods shipped (R. 3). Under the applicable New Jersey statutes no answering pleading is required to be filed by the defendant (See Appendix "C" *infra*, page 21), and none was filed here. The petitioner appeared and defended on the ground that it did not create and had no knowledge of the undercharge; that it had not contracted with the shipper or the respondent-carrier to pay shipping charges; and that the shipper who had contracted to pay such charges was in existence and solvent (R. 3-5). The case was tried, without a jury, on a stipulation of facts (R. 2).

The trial court entered judgment for the defendant-petitioner on the authority of this Court's decision in *Louisville & Nashville Railroad Company* v. *Central Iron*

& Coal Company (1924), 265 U. S. 59, 68 L. Ed. 900 (R. 6). The respondent appealed to the Appellate Division of the Superior Court of New Jersey (R. 7), on the ground that a consignee who accepts liability of an interstate shipment becomes liable as a matter of law, for the full amount of the filed and posted tariff charges, the liability resting upon public policy as expressed in the Interstate Commerce Act (49 U. S. C., Section 6(7)), which forbids preferences "in any manner or by any device." (See Appendix "D", *infra*, page 22 at page 26). While pending in the Appellate Division of the Superior Court, the case was certified to the Supreme Court of New Jersey on the latter's motion (R. 1). The Supreme Court of New Jersey decided that by virtue of the Statute referred to, a consignee who accepts delivery of an interstate shipment becomes liable, as a matter of law, for shipping charges (R. 11-19) irrespective of whether or not the consignee has contracted, expressly or impliedly, with the carrier to pay such charges (R. 11-19), and reversed the judgment of the Essex County (New Jersey) District Court (R. 20). The Supreme Court of New Jersey is the highest court of the State of New Jersey in which a decision on this case could be had (See Appendix B, *infra*, page 21).

Question Presented.

Whether a consignee who accepts delivery of an interstate shipment, but who has not contracted, expressly or impliedly, with either the shipper or the carrier to pay freight charges, and has so informed the carrier prior to delivery, is liable nevertheless for shipping charges for which the shipper contracted and is able to pay, by virtue

of the provisions of Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)), (Act February 4, 1887, c. 104, Sec. 6, par. 4, 24 Stat. 381, as amended Act March 2, 1889, c. 382, Sec. 1, pars. 4, 7, 25 Stat. 856, 857, Act June 29, 1906, c. 3591, Sec. 2, Sec. 6, par. 6, 34 Stat. 587, Act February 28, 1920, c. 91, Sec. 411, Sec. 6, par. 6, 41 Stat. 483) where by the common law of the State in which delivery occurred (New Jersey) a consignee is not liable for freight charges in the absence of an express or implied contract with the carrier to pay the same.

Statute Involved.

The pertinent statutory provisions are set forth in Appendix A *infra,* page 20.

Statement.

On May 6, 1947 the petitioner entered into a contract with one Bernard Pipe Supply of Los Angeles, California, for the purchase of 291 boxes of loading assemblies, by the terms of which contract the seller was to prepay the shipping charges (R. 3, pars. 5, 6). On or about June 1, 1947 the Officer in Charge, Construction Battalion Center, Port Hueneme, California, as agent of the seller, delivered the said assemblies to the respondent's agent at Oxnard, California, for shipment to the petitioner at Newark, New Jersey (R. 3, par. 1). The assemblies were described in the bill of lading as "291 BXS Pipe Fittings, NOIBN, I/S" (R. 3, par. 1). The abbreviation "I/S" is accepted among carriers as meaning "Iron and Steel." (R. 3, par. 2). The shipment actually consisted of iron and steel pipe with

fittings and brass valves (R. 3, pars. 3, 4). The shipper's agent prepaid the respondent's charges of $1,082.42 on the basis of tariffs and schedules of the Interstate Commerce Commission applicable to shipments of iron and steel (R. 3, par. 1). Prior to the arrival of the goods in Newark, New Jersey petitioner received from the seller in California, an invoice for the price of the goods, which indicated that the shipping charges had been prepaid (R. 4, par. 7). Enclosed with the invoice was a uniform straight bill of lading indicating that the freight charges were to be collected (R. 4, par. 8). Shortly thereafter, petitioner received an arrival notice from the Pennsylvania Railroad Co., the terminal carrier, indicating that the goods had arrived at its freight station in Newark and could be picked up there. Said arrival notice also indicated that ffeight charges had been prepaid (R. 4, par. 9).

The petitioner, although it knew that the shipment consisted partly of brass (R. 3, par. 3), did not know that said shipment had been misdescribed for rate classification purposes or otherwise (R. 3, par. 3), nor did it know the meaning of the initials "I/S" or that the bill of lading incorrectly described the shipment for rate classification purposes (R. 3, par 3), nor did it know from the bill of lading or otherwise, what freight charges, if any, had been paid by the shipper (R. 5, par. 18). However, in view of the conflicting statements on the invoice and arrival notice as compared with the bill of lading, the petitioner communicated with the terminal carrier, the Pennsylvania Railroad Co., before accepting delivery of the goods or paying the shipper for the same, and inquired concerning shipping charges, explaining that by its contract with the shipper the latter

was to pay such charges; that the shipper's invoice indicated shipping charges had been paid in full; that the Pennsylvania Railroad Co.'s arrival notice also indicated that shipping charges had been paid in full, but that the bill of lading issued by respondent indicated that shipping charges were to be collected; that by reason of its contract with the shipper, *it was unwilling to accept delivery of the goods* or pay the shipper for the same until it knew whether there were any shipping charges payable (R. 4, par. 10). The Pennsylvania Railroad Co. informed petitioner that shipping charges had been prepaid in full (R. 4, par. 11). In reliance thereon petitioner accepted delivery of the goods and paid the shipper the full contract price therefor (R. 4, par. 12).

Approximately eighteen months later, a representative of the Pennsylvania Railroad Co. called on petitioner and inquired concerning the nature of the shipment, and for a description of the property shipped (R. 4, par. 13). Petitioner described said shipment to said representative who thereupon informed petitioner that the goods had been improperly classified by the shipper, as a result of which there were additional freight charges due and payable (R. 5, par. 14). The petitioner informed said representative that by the terms of its contract with the shipper it was the shipper and not petitioner who was liable for freight charges, exhibiting its contract with the shipper to said representative, in substantiation of its contention, and informed said representative that any unpaid freight charges would have to be collected from the shipper (R. 5, par 15). The respondent has made no effort to collect said shipping charges from the shipper, although the latter is still in business and solvent (R. 5, pars. 20, 21). Instead, it instituted the present

suit in the Essex County (New Jersey) District Court on June 16, 1949, against the petitioner to collect said unpaid charges in the amount of $738.37 (R. 2, pars. 1, 2). The case was tried, without a jury, on a stipulation of facts (R. 2, pars. 1, 3). The respondent contended that the petitioner, having accepted the shipment, was liable, as a matter of law, for the shipping charges by virtue of the provisions of 49 U. S. C., Section 6(7) and the decisions of this Court in the cases of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Alvin J. Fink* (1919), 250 U. S. 577, 63 L. Ed. 1151, and *Louisville & Nashville Railroad Company* v. *United States* (1925), 267 U. S. 395, 69 L. Ed. 678 (R. 6).

Petitioner contended that it had not contracted with the carrier or the shipper to pay shipping charges; that the shipper had contracted for such charges and was able to pay and that, therefore, on the authority of the reasoning of this Court in the case of *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company, (supra),* it was not liable to the carrier for the balance of freight charges demanded (R. 6).

The trial court found that petitioner had not, in fact, contracted with the carrier to pay shipping charges, and on the authority of the *Central Iron* case, *(supra),* entered judgment for the petitioner on March 10, 1950 (R. 6).

The respondent appealed to the Appellate Division of the Superior Court of New Jersey (R. 7) on the ground that a consignee who accepts delivery of an interstate shipment becomes liable, as a matter of law, for the full amount of the filed and posted tariffs, the liability resting

upon public policy as expressed in the Interstate Commerce Act (49 U. S. C., Section 6(7)) which forbids preferences "in any manner or by any device" (See Appendix "D", *infra*, page 22 at page 26). While pending in the Appellate Division of the Superior Court the case was certified to the Supreme Court of New Jersey (the court below) on the latter's motion (R. 1). The court below held that the only issue involved was one of law (R. 11); that petitioner's liability for the freight charges became fixed as a matter of law upon acceptance of the shipment on the authority of 49 U. S. C., Section 6(7) and this Court's decision in the case of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Alvin J. Fink, (supra)* (R. 11-19), and by a divided court (R. 19) on December 4, 1950 reversed the judgment of the Essex County (New Jersey) District Court (R. 20).

Specification of Errors to Be Urged.

The Supreme Court of New Jersey erred:

1. In holding that a consignee of an interstate shipment who has not contracted with the carrier or the consignor to pay shipping charges where such contractual committment is the basis of common law liability in the state where the transaction occurred, but who nevertheless accepts the shipment, is liable as a matter of law, for shipping charges for which the shipper contracted and is able to pay, by virtue of the provisions of Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)).

2. In not holding that Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) imposes no lia-

bility on a consignee for shipping charges for which the shipper contracted and is able to pay, unless the consignee has expressly or impliedly contracted with the carrier to pay the same, where such contractual committment is the basis of the common law liability of a consignee for such charges in the state where delivery occurred.

3. In holding that Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) completely abrogated the rule of New Jersey common law that a consignee is not liable to the carrier for shipping charges for which the shipper contracted and is able to pay, in the absence of an express or implied contract with the carrier on the part of the consignee, to pay the same.

4. In not holding that Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) merely modified the rule of New Jersey common law that a consignee is not liable to the carrier for shipping charges for which the shipper contracted and is able to pay, in the absence of an express or implied contract with the carrier on the part of the consignee to pay the same, to the extent that:

a. If any such contract be entered into the parties are conclusively presumed to have contracted for the payment of the full legal rate, *i. e.*, those filed and published by the Interstate Commerce Commission under the statute referred to.

b. Once contractual liability of a consignee to a carrier to pay freight charges is created, no act or omission of the carrier (except the running of the Statute of Limitations) can estop or preclude it from enforcing payment of the full amount.

c. Neither by the contract nor by any act or omission of the carrier at or after the creation of the same, can the carrier be estopped or precluded (except by the running of the Statute of Limitations) from enforcing payment of the full amount by a consignee who has expressly or impliedly contracted to pay the same.

5. In reversing the judgment of the Essex County (New Jersey) District Court.

Reasons for Granting the Writ.

Preliminary Statement.

Since the essence of the question presented by the decision of the court below and this application for a writ of certiorari to the Supreme Court of New Jersey to review the same is the extent to which Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) has modified or abrogated the common law, in the interests of brevity and the avoidance of repetition hereafter, petitioner here states what it believes the New Jersey common law to be; *viz.*, (a) that the mere existence of the relation of carrier and consignee is not enough to establish a liability of the latter to pay freight charges; there must be an agreement by the consignee, express or implied, in order to create such a liability; (b) where a common carrier, upon delivery of goods at destination, waives its right of lien for unpaid freight charges and permits the consignee to remove the goods, the mere acceptance and removal of the goods by the consignee with the knowledge that the carrier is thereby giving up its carrier's right of lien, does not create an obliga-

tion on the part of the consignee to pay freight charges; (c) even where, under the circumstances set forth in (b) the consignee has knowledge (there was no such knowledge on the part of the consignee here) that freight charges to a certain amount remain unpaid, mere acceptance and removal of the goods by the consignee does not, standing alone, create an absolute liability on the part of the consignee for freight charges. Acceptance and delivery by the consignee under such circumstances, unexplained and uncontradicted, is sufficient evidence from which a court may imply a promise to pay freight charges, but it is still open to the consignee to offer other evidence explaining or contradicting the implications otherwise to be drawn from its acceptance of the goods; and it is open for the court and jury, notwithstanding the acceptance of the goods by the consignee and the concurrent waiving of its right of lien by the carrier, to find that the consignee, by such conduct did not impliedly promise to pay freight charges.(1)

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1. The decision of the court below in the instant case establishes the rule that a consignee who accepts delivery of a shipment in interstate commerce is liable, as a matter of law, to the carrier by virtue of the provisions of Section

(1) See *Central Railroad Company of N. J.* v. *MacCartney* (N. J. Sup. Ct., 1902), 68 N. J. L. 165, 52 Atl. R. 575 and *Pennsylvania Railroad Co.* v. *Townsend* (E. & A., 1917), 90 N. J. L. 75, 100 Atl. R. 855. It is believed that the common law of New Jersey is in accord with the common law generally on this point. See *Williston on Contracts* (1936 Ed.), Vol. 1, Secs. 90, 90B and especially Sec. 90BB. See also *American Law Institute, Restatement of the Law of Contracts*, Sec. 70.

N. B. To avoid possible confusion with the statements under the caption "Jurisdiction" above, it should be noted that the Supreme Court which decided the *MacCartney* case is not the same court whose judgment is sought here to be reviewed. The former was abolished by the New Jersey Constitution of 1947. So also, by the Constitution of 1947, New Jersey's former court of last resort (Court of Errors and Appeals) was superseded by the Supreme Court of New Jersey (the court below).

6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) for shipping charges for which the shipper contracted and is able to pay (R. 11-19), it being immaterial to such liability whether or not the consignee has expressly or impliedly contracted to pay all or any part of the shipping charges (R. 16), where by state law such contractual undertaking is a condition precedent to the liability of an accepting consignee (R. 17-18). This Court has never passed upon the liability of a non-contracting consignee under said Statute for such charges.(2) Clearly, the question presented is of importance to the public and in the administration of the federal laws relating to interstate commerce, and the question ought to be finally determined by this Court.

2. The decision of the court below in the instant case and the decisions of the Eighth Circuit Court of Appeals in *Central Warehouse Co.* v. *Chicago, R. I. & P. Ry. Co.* 1927), 20 Fed. (2d) 828, and *F. Burkart Manufacturing Co.* v. *Fort Worth and D. C. Ry. Co* (1945), 149 Fed. (2d) 909 are directly in conflict with the decision of the Sixth

(2) In the cases of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Alvin J. Fink* (1919), 250 U. S. 577, 63 L. Ed. 1151, and *New York Central & Hudson River Railroad Company* v. *York & Whitney Company* (1921), 256 U. S. 406, 65 L. Ed. 1016, this Court decided that a consignee who had contracted with the carrier to pay shipping charges and did in fact pay the charges demanded at delivery, but who, through a mistake on the part of the carrier, paid less than the published tariff rate, was liable for the difference between the amount collected at delivery and the correct amount calculated on the basis of the published tariffs, and no change of position by the consignee subsequent to the delivery of the goods and the original payment could estop the carrier from collecting the full tariff charges. In both cases this Court stated that the basis of the consignee's liability was his assumption of (the liability for) such charges.

In the case of *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company* (1924), 265 U. S. 59, 68 L. Ed. 900, this Court held that a shipper was not liable for an undercharge in freight on an interstate shipment where the shipper had not, in fact, contracted to pay shipping charges, and the consignee not only had agreed to pay the same but did in fact pay the amount demanded at delivery although, through a mistake on the part of the carrier, this amount was less than was properly payable under the published tariffs.

Circuit Court of Appeals in the case of *Davis* v. *Akron Feed & Milling Co.*, 296 Fed. 675.(3)

3. The decision of the court below in the instant case is in conflict with the reasoning of this Court's decision in *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company (supra)*. In the interest of the public and because of the importance of the question in the administration of federal laws relating to interstate commerce, it is believed that this Court ought finally determine whether the principles established by it in the *Central Iron* case *(supra)* control in determining the liability of a consignee for freight charges, or whether those principles are limited in their application to actions involving consignors.(4)

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(3) The court below and the Eighth Circuit construe the *Fink* and *York & Whitney* cases (*supra*), as imposing an absolute liability for freight charges by virtue of and solely because of the consignee's acceptance of the shipment, ignoring that in both decisions by this Court the basis of the consignee's liability was the latter's contractual undertaking (assumption) to pay freight charges, *plus* the acceptance of the shipment, *i. e.*, the consideration received for the executed promise to pay freight. In the Eighth Circuit cases the issue as to whether or not the consignee had contracted with the carrier to pay the charges sued for, was not raised by counsel or passed upon by the court. The actions were defended on the plea of estoppel, based on the equities involved. If liability exists, of course, estoppel is no defense. However, in the case of *Davis* v. *Akron Feed & Milling Co.*, 296 Fed. 675, the Sixth Circuit held that estoppel was a good defense to liability on the facts there presented. It is believed that the Sixth Circuit decision is correct in its result but wrong in its reasoning. The rule of decision ought to have been that the defendant did not contract to pay the shipping charges there sued for.

(4) In the *Central Iron* case (*supra*), this Court laid down these tests determinative of a consignor's liability for freight charges on an interstate shipment: (a) Did the shipper expressly or impliedly contract with the carrier to pay freight charges? If not, then he is not primarily liable for the same. (b) Did the other party to the shipping contract (in that case the consignee) assume the payment of freight charges? If so, then under the *Fink* decision he assumed payment of the full legal charges and the shipper is not secondarily liable. (c) In every case tests (a) and (b) are questions of fact to be determined by the trial court.

In the instant case the court below held that the only question presented in an action against a consignee to collect an undercharge of freight contracted for by the consignor is: Did the consignee accept the shipment? If the shipment is accepted, said the court, liability of the consignee for the full amount of freight charges due and payable under the statute, is automatically fixed as a matter of law. It also held that the principles of the *Central Iron* case (*supra*) were limited in their application to actions involving the liability of a consignor, yet nothing in the statute involved or the public policy established thereby, requires or even suggests this limitation.

4. Clearly the question presented by the decision of the court below is of public importance ([5]) in the administration of the federal laws relating to interstate commerce, not only for the reasons set forth in paragraphs 1, 2 and 3 *(supra)*, but also because:

a. The rule of decision of the court below in the instant case burdens interstate commerce and those receiving goods in such commerce, by making a consignee of such goods, despite his most forthright and careful efforts to avoid it, a surety against the solvency of the shipper, or the mistake or fraud of the shipper or carrier or both.

b. The rule of decision of the court below in the instant case permits a carrier, capriciously or by connivance, to flout and pervert the intent of Congress and its plain mandate in the statute referred to, by enabling the carrier to recover from a consignee who accepts the shipment, the amount of an undercharge which the latter did not create, had no knowledge of, never contracted to pay and from which it benefited in no way, instead of collecting the same from its customer, the shipper, who contracted for and is able to pay the same; thus granting to a favored, careless or dishonest shipper, a privilege or facility in the transportation of property not specified in the filed tariffs, the granting of which is expressly prohibited by the statute in question.

([5]) In 1946 (the latest year for which statistics are available) Class I railroads had car loadings (excluding less than carload shipments) totaling 25,876,880 cars. The total freight tonnage carried by such railroads for the same year was 1,060,489,345 tons in carload shipments and 15,792,705 in less than carload lots. Source: *Freight Commodity Statistics—Class I Steam Railroads in the United States, 1947 Statement 48,100, Interstate Commerce Commission.*

The total national revenue from freight transportation for the year 1946 amounted to $4,820,753,042 on carload lots and $365,669,160 on less than carload lots. Source: Study by the Bureau of Transport, Economics and Statistics entitled *"Freight Revenue and Value of Commodities, 1946, Interstate Commerce Commission"*.

5. The decision of the court below is believed to be erroneous and in conflict with the reasoning of this Court in the case of *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company (supra)*, which sets forth the applicable standards for determining a consignor's liability for freight charges. It is believed that the same principles ought to control in determining the liability of a consignee and that by the application of those standards to the instant case, the decision of the court below is erroneous.([6])

It is further believed to be erroneous in that the court below considered the instant case within and disposed of by this Court's decision in the case of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Alvin J. Fink (supra)* whereas, that case involved an entirely different issue than the one presented in this case.([7])

([6]) See Note (4). In the instant case the trial court found as a fact that the consignee did not contract with the carrier to pay freight charges. In addition, the record establishes that the other party to the consignment, *viz.*, the shipper, did contract with the carrier to pay shipping charges and was liable for the full amount thereof despite the signing of the non-recourse clause on the bill of lading. Cf. *Thompson* v. *Temple Cotton Oil Co.* (D. C. W. D. Ark., 1943), 54 Fed. Supp. 135, *Thompson* v. *Texarkana Cotton Oil Corp.* (D. C. W. D. Ark., 1943), 54 Fed. Supp. 212, *Chicago, B. & Q. R. Co.* v. *E. Bernier & Sons* (D. C. Minn., 1944), 56 Fed. Supp. 691 (694); See also *M'Ferran* v. *Taylor*, 3 Cranch. 270, 2 L. Ed. 436; *Cooper* v. *Schlesinger*, 111 U. S. 148, 28 L. Ed. 382; *Moore* v. *Crawford*, 130 U. S. 122, 32 L. Ed. 878. Barring the transposition of the parties to the consignment, the instant case is identical on its facts with those in the *Central Iron* case and petitioner believes that the failure of the court below to determine its liability by the application of the principles stated in the *Central Iron* case was error.

([7]) See Note (2). In both the *Fink* and *York & Whitney* cases (*supra*), the consignee contracted with the carrier to pay and did pay shipping charges but through mistake paid less than the posted tariff rate required. As pointed out in Note (2) above, it was the *assumption* by the consignee of the obligation to pay freight charges, plus the receipt of the shipment thereunder, which established the consignee's liability. In failing to recognize that the absence of contractual undertaking on the part of the petitioner here, removed the instant case from the realm of application of the principles announced by this Court in the *Fink* and *York & Whitney* cases (*supra*), the court below committed error. Similarly, the court erred in failing to recognize that when this Court, speaking through Mr. Justice Brandeis in the *Central Iron* case (*supra*), said (265 U. S. at p. 70), that "Under the rule of the *Fink* case, if

The absence of any undertaking or assumption on the part of the petitioner to pay shipping charges, plus the unquestioned liability of the shipper for the undercharge, plus the fact that the petitioner in no way, directly or indirectly, contributed to, participated in, had knowledge of or benefited by the undercharge, were the only issues raised by the petitioner and are the sole bases on which it denied liability in the court below (R. 3-5 and Appendix "E", *infra*, page 32).

The court below devotes much space in its opinion to setting forth why the principle of estoppel cannot be applied to the carrier in the instant case (R. 13-15), but the defense of estoppel was not raised by petitioner and has no bearing on the issue presented (See Appendix "E", *infra*, page 32). Obviously once the liability to pay shipping charges is created, neither estoppel nor contract can limit or defeat the liability, but the injection of the question of estoppel merely confuses the issue, it does not decide it. The issue involved in this case is not whether, liability existing, the carrier is estopped to enforce it. The issue is rather that no such liability was ever created. Estoppel is an affirmative defense to an existing obligation. The defense here is the general issue.(8)

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a shipment is accepted the consignee becomes liable as a matter of law for the full amount of freight charges, whether they are demanded at the time of delivery, or not until later * * * this Court had reference to a consignee situated as the consignee was in both the *Fink* and the *Central Iron* cases (*supra*), *i. e.*, a consignee who had expressly or by his conduct, impliedly, contracted with the carrier to pay freight. The defense in the instant case is not that petitioner did not contract to pay any greater charges than were paid by the consignor or were demanded before delivery. Rather the defense is that petitioner never contracted with the carrier to pay any part of the shipping charges.

(8) Cf. *Stone* v. *Bank of Commerce*, 174 U. S. 412, 43 L. Ed. 1028; *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, *Gilmer* v. *Poindexter*, 10 How. 257, 13 L. Ed. 411 and *Philadelphia, W. & B. R. Co.* v. *Howard*, 13 How. 307, 14 L. Ed. 157. Presumably, because of the inequities usually present in cases

So also, the court below discusses at length the "discriminatory preferences" (R. 13, 14) and "the involuntary rebates" (R. 16) which the statute (admittedly) condemns, and which, if the trial court's judgment were affirmed (implies the court below) the petitioner would receive, yet nowhere in its opinion does the court below state or define what preference or rebate it believes petitioner did receive. The record discloses none and confirms that the petitioner received none. Petitioner had a firm contract for the purchase of the goods shipped, before they were delivered to the carrier (R. 3, par. 5). What amount of freight charges the shipper paid was immaterial to petitioner because by the latter's contract, shipping charges were to be prepaid by the shipper (R. 3, par. 6). Petitioner paid the shipper exactly to the penny the same amount it would

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of this type, all of the lower federal court decisions, with one exception, cf. *Cincinnati Northern R. Co.* v. *Beveridge* (D. C., Va., 1925), 8 Fed. (2d) 372, and all of the state court decisions involving factual situations similar to the present case, turn on the issue of estoppel. Uniformly they assume the rule to be deduced from this Court's decisions in the *Fink* and *York & Whitney* cases (*supra*), to be that acceptance of the goods imposes an absolute liability for freight charges, ignoring, as mentioned in Note (2) above, that it was the contractual undertaking of the consignee in those cases plus the acceptance of the goods which fixed liability. In some of the cases at least, it would seem that the consignee did not contract with the carrier to pay the freight charges sued for, but that issue was not raised by counsel nor passed upon by the court. Even in the Sixth Circuit case of *Davis* v. *Akron Feed & Milling Co.* (*supra*), where the court found for the consignee, it based its decision on the "estoppel" of the carrier to recover. In that case a consignee contracted with a shipper in Chicago for goods there located, to be shipped F.O.B. Akron, freight prepaid by the shipper. Upon arrival the carrier represented that shipping charges, if any, prior to the arrival of the goods in Chicago, had been paid, and that the only charges due were those from Chicago to Akron which the consignee paid, and took delivery. Subsequently it was discovered that there remained unpaid shipping charges on the goods from Kansas City to Chicago, and the carrier sued to recover. It is submitted that a sounder rule of decision would have been that the consignee never contracted with the carrier to pay the charges sued for; that in the light of all the facts it could have intended only to contract for transportation from the point of origin under its contract of sale, to the point of destination, and that contract it discharged. Parenthetically, it should be stated that if the test of liability established by the decision of the court below be sound, then the consignee in the *Davis* case ought to have been held liable for the charges sued for.

have paid if the goods had been correctly described and the proper charges had been paid by the shipper (R. 4, par. 12 and R. 5, par. 18). To say, as the court below said in effect, in the instant case, that to permit recovery of shipping charges by the carrier from the petitioner on the basis of the record in the case, is merely a recapture by the carrier of an "involuntary rebate" obtained by the consignee, is to distort and confuse the plain words and the meaning of the statute. The consignee here, by virtue of its contract with the shipper, had a freight rate of zero to begin with. The only rebate it could have received would have to have been a bonus from the carrier for taking the goods. Obviously there was none.

The decision of the court below is further believed to be erroneous in holding that this Court's decision in the case of *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company (supra)* is limited in its application to situations involving the liability of a consignor for freight charges (R. S. 18). ([9])

Petitioner further believes the decision of the court below to be erroneous in that the effect of it is to burden instead of promote interstate commerce, because under it a consignee who accepts a shipment cannot, in any way prior to or at acceptance of the shipment, protect itself against

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([9]) See Note (4). The language of the statute suggests no such distinction. On the contrary, the language of the statute indicates that it was rebates or remissions, of whatever nature, by a carrier to a shipper, at which the statute was specifically and principally aimed for it provides: "nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to *any shipper* or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." Yet the decision of the court below permits and approves the carrier's granting to a shipper who contracted to pay the full lawful rate, the preferential benefit specifically prohibited.

the mistake, the fraud or even the solvency of the shipper or the carrier or both, and in that it permits a carrier, by caprice or by design, to violate the express provisions of the statute on which its right to sue purports to rest, by giving a shipper the very sort of preference the statute condemns, leaving it to the consignee to collect as best he can, an unjust exaction imposed upon him under the guise of public policy.([10])

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROY C. COLLINS,
Counsel for Petitioner.

Dated: February 13, 1951.

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(10) This is nowhere more graphically illustrated than in the case at hand. The shipper is liable for the full legal charges calculated under the filed tariffs. The undercharge resulted from acts or omissions by the shipper, the carrier or both. The consignee did not contract with either the shipper or the carrier to pay freight charges. It made its position known to the carrier before it accepted delivery. It had no knowledge of, did not participate in, or benefit by the undercharge. Yet, said the court below, the consignee must pay because the carrier so elects; public policy requires it. Thus, the shipper is left free to enjoy the prohibited preference unless and until the consignee elects to travel 3,000 miles from home in an attempt to secure, by deposition or the transportation of witnesses, a judgment it may never collect. Certainly, such a fantastic result was never intended by Congress or by this Court.

Appendix "A".

49 United States Code, Section 6(7).

(Act February 4, 1887, c. 104, Sec. 6, par. 4, 24 Stat. 381, as amended Act March 2, 1889, c. 382, Sec. 1, pars. 4, 7, 25 Stat. 856, 857, Act June 29, 1906, c. 3591, Sec. 2, Sec. 6, par. 6, 34 Stat. 587, Act February 28, 1920, c. 91, Sec. 411, Sec. 6, par. 6, 41 Stat. 483).

"Sec. 6, par. (7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Appendix "B".

Excerpt from the Constitution of New Jersey of 1947.

(N. J. S. A. Const. Art. VI., Sec. 2, Par. 2).

* * * *

ARTICLE VI.
Judicial.

* * * *

Section II.

1. * * *

2. The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution.

Appendix "C".

Excerpt from New Jersey Statute Dealing with Practice and Procedure in the County District Courts.
(N. J. S. A. 2:30-10.6).

"The defendant in any civil action in a district court may defend by entering his appearance before the clerk of the court or filing an answer with said clerk within ten days after service upon him of the summons and complaint. If the defendant files a written answer, a copy of such answer shall be served upon the plaintiff, or plaintiff's attorney, if any, within the time required for the filing of the answer. Any such appearance, filing and service may be made by mail. (Laws of 1948, c. 385, p. 1570, Section 6.)

Appendix "D".

Brief Filed with Court Below, by Respondent, Southern Pacific Company.

Superior Court of New Jersey

APPELLATE DIVISION.

DOCKET NO. A-404-49.

SOUTHERN PACIFIC COMPANY,
Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a corporation of the State of New Jersey,
Defendant-Respondent.

Civil Action.
On Appeal from Essex County District Court.
Sat below: Lyons, *J.*

BRIEF FOR APPELLANT.

RICHARD F. GREEN,
Attorney for and of Counsel with Appellant,
7 West Grand Street,
Elizabeth 4, New Jersey.

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STATUTE.

49 U. S. Code, Sec. 6(7) 26

Statement of Question Involved.

Whether a common carrier may under the Interstate Commerce Act, recover from the consignee the balance of freight charges on an interstate shipment where the consignor misdescribed the goods in the bill of lading and accordingly prepaid the freight at a rate lower than that provided in the filed tariffs for the goods actually shipped, the consignee having refused to accept the shipment until assured that the freight was prepaid, and having changed his position in reliance on such representation.

Statement of the Case.

The case was submitted to the Judge of the Essex County District Court on a stipulation of fact, which stipulation is incorporated in the Agreed Statement in Lieu of Record, 1a, *et seq.*

The plaintiff respectfully submits that the judgment of the Essex County District Court in favor of the defendant should be reversed for the following reasons:

1. A consignee who accepts delivery of an interstate shipment becomes liable as a matter of law for the full amount of the filed and posted tariff charges.

2. Consignee's liability depends upon public policy as expressed in mandatory legislation (U. S. Code, Title 49, Sec. 6(7)) which forbids preferences "in any manner or by any device".

3. No estoppel can prevent plaintiff's recovery, for plaintiff is obligated to collect as trustee for the public.

I.

A consignee who accepts delivery of an interstate shipment becomes liable as a matter of law for the full amount of the filed and posted tariff charges.

The consignee's liability attaches as a matter of law on his acceptance of delivery, regardless of his agreement to the contrary with the carrier, or with the consignor.

> *Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co.* v. *Fink* (1919), 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151;
>
> *Chicago & Northwestern Ry. Co.* v. *J. I. Case Plow Works* (1921), 173 Wis. 237, 180 N. W. 846.

This result follows from the terms of the bill of lading itself; Section 7 of the "Contract Terms and Conditions", which appears on the reverse of the bill of lading, provides:

> "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; * * * The consignor shall be liable for the freight and all other lawful charges except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges." (The proviso which follows relates to shipments diverted and re-consigned en route, and has no application here).
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> * * * * * * *
>
> "If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

The consignor is, at most, equally liable with the consignee, but since the non-recourse clause on the face of the bill of lading was executed in the instant case, the consignor has a good defense, and the plaintiff, since it is under a duty to collect from someone, must collect from the consignee, the defendant in this cause.

While there is some difference of opinion in the earlier Federal cases, the New Jersey decisions since 1917 all hold that the consignee is liable on the facts of the present case:

> *West Jersey & Sea Shore R. Co.* v. *Lake & Risley Co.* (N. J. Sup. Ct., 1929), N. O. R. 145 Atl. 336;
> *Atlantic City Railroad Co.* v. *Packman* (Sup. Ct., 1929), 147 Atl. 635, 7 N. J. Misc. 945;
> *N. Y. Central R. R. Co.* v. *Stanziale* (E. & A., 1929), 105 N. J. L. 593.

II.

Consignee's liability depends upon public policy as expressed in mandatory legislation which forbids preferences "in any manner or by any device."

> "This may be in the present as well as some other cases a hardship upon the consignee, due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation."
>
> *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink, (supra).*

In the case of *Western & Atlantic Railroad Co.* v. *Underwood* (D. C., Ga., 1922), 281 Fed. 891, in which a consignee was held liable for additional freight charges, the court said (at page 893):

> "That the consignee cannot accept delivery without incurring liability for the carriers charges, known or unknown, supposed to be prepaid or otherwise, and no matter what the consignee's actual relation to the shipper is, appears a harsh rule, but is seemingly established by authority. If by the shipper's omission the consignee is thus made liable for a charge which as between him and the shipper should not be borne by him his recourse is on the shipper. The carrier is not bound by their private rights in the transaction, whether known or unknown to it, nor by any mistake or misrepresentation occurring, but under the law may look to the shipper as the original contactor to pay and to the person who was consignee accepts the goods and becomes by statute liable to discharge the lien thereon until the lawful charges are satisfied."

In the pending case there was, instead of an "omission" on the part of the shipper, an erroneous description of the merchandise. But there is no difference in principle: As between carrier and consignee the carrier must prevail.

To the same effect, and on all fours with the pending case except that the shipper was insolvent, is the case of *Chicago, Rock Island and Pacific Railway Co.* v. *Central Warehouse Co.*, (D. C., Minn., 1926), 14 Fed. (2d) 123, where the court held that the carrier must recover regardless of hardship on the consignee. Affirmed, (C. C. A. 8, 1927), 20 Fed. (2d) 828.

> "It might be conceded that the rule * * * is harsh and inequitable in some instances. However it seems to be well established that a consignee cannot accept an interstate shipment without becoming liable for the carrier's lawful charges, known or unknown, supposed to be paid or otherwise no matter what relation exists between the shipper and the consignee."
>
> *Norfolk & Western Ry. Co.* v. *Williamson Grocery Co.* (W. Va., 1927), 103 W. Va. 532; 138 S. E. 102, at 104.

Under a bill of lading which, like that in the pending case, provides that the owner or consignee shall pay the freight, and where there is doubt as to the liability of the shipper, the accepting consignee is as between himself and the carrier, primarily liable.

> *Louisville & Nashville R. Co.* v. *Central Iron & Coal Co.* (1924), 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900.

III.

No Estoppel can prevent plaintiff's recovery, for plaintiff is obligated to collect as a trustee for the public.

In *Great Northern Railway Co.* v. *Hyder* (D. C., Wash., 1922), 279 Fed. 783, the plaintiff carrier delivered and defendant consignee accepted delivery of goods, both under the mistaken belief that the charges has been prepaid. The issue framed by the defendant and accepted by the court was stated:

> "Can a consignee, who is not at any time the owner of the goods shipped, who has not agreed with either the shipper or the carrier that he will pay the freight, who accepts the goods upon the carrier's representation that the freight has been prepaid, be bound by such acceptance to pay the freight?"

The court decided in the affirmative, that the consignee is bound, and in denying a plea of estoppel held that the shipper, the carrier, and the consignee are all trustees for the public, against which no estoppel can operate because it, the public, had done nothing and had made no representation on which the defendant could have relied.

To the same effect:

> *Main Island Creek Coal Co.* v. *Chesapeake & Ohio Ry. Co.* (C. C. A. 6, 1928), 23 Fed. (2d) 248.

In *New York, New Haven and Hartford Railroad Co.* v. *Lord & Spencer* (Mass., 1931), 273 Mass. 583; 174 N. E. 179, a shipment from Mississippi to Indiana was diverted en route to New Jersey, and again re-consigned to Boston. Charges were "collect" but by the carrier's error the way bills showed prepayment. Defendant demanded and received specific confirmation that charges as far as New

Jersey had been paid; nevertheless, when the error was discovered and the carrier sued for the previous charges, the court allowed recovery. The court noted but refused to follow:

American Express Co. v. *Sweeney* (D. C., Mass., 1922), 283 Fed. 691;
Cincinnati Northern R. Co. v. *Beveridge* (D. C., Va., 1925), 8 Fed. (2d) 372;
Davis v. *Akron Feed & Milling Co.* (C. C. A. 6, 1924), 296 Fed. 675.

Estoppel will not avail an innocent consignee even when the misrepresentation as to prepayment is due to fraud and conspiracy between the shipper and the carrier's freight agent.

Fort Worth & Denver City Railway Co. v. *F. Burkart Manufacturing Co.* (D. C., Mo., 1944), 56 F. Supp. 159. Affirmed: (C. C. A. 8, 1945), 149 Fed. (2d) 909.

Conclusion.

The defendant, Wheaton Brass Works, was the consignee and owner of the goods shipped, and regardless of any equities it may have as against the shipper, it is liable to the carrier both by the terms of the bill of lading and as a matter of law, for the full amount of the lawful freight charges on the shipment.

It is respectfully submitted for the foregoing reasons that the judgment below should be reversed and judgment entered for the plaintiff.

Respectfully submitted,

RICHARD F. GREEN,
Attorney for Plaintiff.

Appendix "E".

Brief Filed with Court Below, by Petitioner, Wheaton Brass Works.

Superior Court of New Jersey

APPELLATE DIVISION.

DOCKET NO. A-404-49.

SOUTHERN PACIFIC COMPANY,
Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a corporation of the State of New Jersey,
Defendant-Respondent.

Civil Action.
On Appeal from Essex County District Court.
Sat below: Lyons, J.

BRIEF FOR RESPONDENT.

ROY C. COLLINS,
Attorney for and of Counsel with Respondent,
24 Commerce Street,
Newark 2, New Jersey.

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Counter-statement of Question Involved.

Whether a common carrier may, under the Interstate Commerce Act, recover from a consignee the balance of freight on an interstate shipment when the consignor, who had contracted to pay all freight charges, misdescribed the goods in the bill of lading and accordingly prepaid the freight at a rate lower than that provided in the filed tariffs for the goods actually shipped, the consignee having refused to contract to pay any part of the freight charges before delivery or to accept the shipment until assured that the freight was prepaid in full, having changed its position in reliance on such representation, and the consignor being still solvent.

ARGUMENT FOR RESPONDENT.

The defendant respectfully submits that the judgment, in its favor, of the Essex County District Court, entered on a stipulation of facts (incorporated in the Agreed Statement in Lieu of Record, A1a, *et seq.)*, should be affirmed for the following reasons:

I.

The basis of a consignee's liability to a carrier of an interstate shipment must be a contract to pay the carrier's shipping charges, either express or implied by the acceptance of the shipment by the consignee with the bill of lading attached.

Acceptance of an offer may be indicated by acts as well as words and acceptance of a document implies assent to its terms.

> *Williston on Contracts*, Vol. 1, Sec. 90, page 252, and 90A, page 257.

The same principle is also stated in Sec. 70 of the *Restatement of the Law of Contracts* as adopted and promulgated by the American Law Institute.

The liability of a consignee for freight charges arises from a contract implied in fact from his acceptance of the goods where the shipping document provides that the consignee shall be liable for freight charges.

> *Williston on Contracts*, Vol. 1, Sec. 90BB, page 270.

The mere existence of the relationship of carrier and consignee is not enough to establish a liability of the latter

to pay freight charges. There must be an agreement by the consignee, express or implied, in order to create such a liability.

Central Railroad Company of N. J. vs. *MacCartney,* (N. J. Sup. Ct., 1902), 68 N. J. L. 165, 52 Atl. 575;

Pennsylvania Railroad Co. vs. *Townsend,* (E. & A., 1917), 90 N. J. L. 75, 100 Atl. 855.

Cf. *New York Central Railroad Co.* vs. *Stanziale,* (E. & A., 1929), 105 N. J. L. 593, 147 Atl. 457, where the court emphasizes that the basis of liability was the fact that the consignee had exercised dominion over the shipment by selling the goods and assigning the bill of lading prior to arrival.

In *Louisville and Nashville Railroad Co.* vs. *Central Iron and Coal Co.* (1924), 265 U. S. 59, 44 S. Ct., 441, 68 L. Ed. 900, Justice Brandeis, delivering the opinion of the court holding that notwithstanding the provisions of the Interstate Commerce Act the liability of a consignor was dependent upon contract, and sustaining a judgment in favor of the consignor because the trial court found that in fact the consignor had never contracted to pay shipping charges, said at page 65:

> "But delivery of goods to a carrier for shipment does not, under the Interstate Commerce Act, impose upon a shipper an absolute obligation to pay the freight charges. The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination. The carrier was at liberty to require prepayment of freight charges, or to permit that payment to be deferred until the goods reached the end of the transportation. * * * Where the payment is deferred, the contract may provide that the shipper agrees absolutely to pay the charges; or it may provide merely

> that he shall pay if the consignee does not pay the charges demanded upon delivery of the goods. Or the carrier may accept the goods for shipment solely on account of the consignee; and * * * may contract that only the latter shall be liable for the freight charges. Or both the shipper and the consignee may be made liable * * *. We must, therefore, determine what promise, if any, to pay freight charges, was, in fact, made by the Central Company."

There was no express agreement on the part of the consignee herein to pay freight charges. Obviously, no such contract can be implied when, in fact, the consignee herein informed the carrier, prior to the acceptance of the goods, that by its contract with the shipper the latter was to pay the shipping charges and that it would, under no circumstances, be liable for freight charges, and the carrier, notwithstanding, delivered the goods to the consignee.

If a consignor may refuse to contract to be liable for freight charges in connection with a shipment made by him, notwithstanding the principle of public policy involved, then certainly the consignee can do the same. And in any given case (to quote the language of Mr. Justice Brandeis) we must determine what promise, if any, to pay freight charges, was, in fact, made.

That is the essence of the consignee's defense here. It does not seek to avoid liability on the ground that it never contracted to pay more freight charges than those collected before delivery. Such a defense would be obviously foreclosed by the holding of *Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co.* v. *Fink* (1919), 250 U. S. 577, 63 L. Ed. 1154. The defense is not that its alleged contract with the carrier was not to pay any more than was demanded before delivery. Its defense is on the broad ground that it never contracted to pay any part of the freight charges, but on the contrary refused to do so or, in other words, refused to so contract before delivery of the goods.

II.

The true intent and effect of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 6 (7)) is (a) that the parties cannot contract to pay other than full regular rates, and (b) that once the contractual liability to pay shipping charges is created, it can only be discharged by payment of the full legal charges.

In *Louisville and Nashville R. Co.* vs. *Central Iron and Coal Co. (supra)*, at page 65, Justice Brandeis said:

> "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the Statute of Limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

Cf. *Williston on Contracts*, Vol. 1, Sec. 90BB, page 270.

In the instant case the plaintiff alone had assumed an obligation to pay the charges. No act or omission of the carrier could estop or preclude it from enforcing payment of the full amount against plaintiff as "a person liable therefor."

The consignee herein was not a party to the contract between the consignor and the carrier, nor did it in any way ratify, confirm or adopt that contract. On the other hand, it unequivocably refused to accept liability for shipping charges or to accept delivery of the goods until assured that the freight was prepaid in full.

III.

Whether in any given case contractual liability of a consignee for shipping charges of an interstate shipment exists, or is created, is a question of fact.

In *Louisville and Nashville R. Co.* vs. *Central Iron and Coal Co. (supra)*, Justice Brandeis said, at pags 66:

> "The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination."

Again, at page 67 of his opinion, Justice Brandeis said:

> "We must, therefore, determine what promise, if any, to pay freight charges, was, in fact, made by the Central Company."

And, further, at page 67 of his opinion (after outlining the evidence which the court normally looks to, to determine whether or not a contract by the consignor to pay shipping charges may be inferred), Justice Brandeis said:

> "But this inference may be rebutted, as in the case of other contracts. It may be shown, by the bill of lading or otherwise * * * that the shipper should not assume any liability whatsoever therefor; * * *"

Again, at page 68, he said:

> "On these facts, the trial court was justified in finding that the Central Company did not assume the primary obligation to pay the freight charges."

See also:

Pennsylvania Railroad Co. vs. *Townsend, (supra);*
and
Central Railroad Company vs. *MacCartney, (supra).*

IV.

The finding of the court below (A7a) as a fact that no contract to pay shipping charges was entered into by the consignee, being confirmed by the stipulated facts, ought not be disturbed by this court.

In its opinion letter, the court below stated:

> "After a consideration of the facts and briefs of counsel, the court cannot find that the consignee herein, the defendant, either factually or legally is primarily or secondarily liable. * * * From the stipulated facts it is apparent that the consignee did not promise either expressly or by implication to pay these freight charges. As a matter of fact, it refused to pay them and inquired what the correct amount was before accepting the shipment." (A7a-12, *et seq.)*

See also the Stipulation of Facts (A3a, *et seq.)* and, particularly, paragraph 10 thereof.

Where there was sufficient evidence before a trial judge, sitting as a court and jury in the district court, to support the judgment, the findings of fact will not be disturbed.

> *DeMoors* vs. *Atlantic Casualty Insurance Co.*, App. Div. (1948), 1 N. J. Super. 1, 61 Atl. 2nd 511.

See also:

> *State* vs. *Richardson,* App. Div. (1949), 4 N. J. Super. 503, 67 Atl. 2nd 885;
> *Serifin* vs. *Wolff,* App. Div. (1949), 5 N. J. Super. 386, 69 Atl. 2nd 347.

V.

The refusal of the consignee to contract for the freight charges did not defeat the public policy expressed in the Interstate Commerce Act because the consignor was still liable for the correct shipping charges notwithstanding the non-recourse clause in the bill of lading.

Where an undercharge results from the consignor's misdescription of the property, he is liable for the payment of the resulting undercharge, even though he has signed a non-recourse clause in the uniform bill of lading.

Thompson vs. *Temple Cotton Oil Co.*, 54 Fed. Supp. 135, D. C. W. D., Ark., 1943;
Thompson vs. *Texarkana Cotton Oil Corp.*, 54 Fed. Supp. 212, D. C. W. D., Ark., 1943;
Chicago, B. & Q. R. Co. vs. *E. Bernier & Sons*, 56 Fed. Supp. 691 (694), D. C. Minn., 1944.

VI.

The cases cited by plaintiff in support of its position have no application unless and until a contract to pay freight charges exists.

Every case cited by the plaintiff (except the *Central Iron* case, which was a suit against a consignor) involves situations where the consignee accepted the goods or exercised dominion over them. In no case does it appear that the consignee affirmatively took the position, before acceptance, that he would not accept the goods if there were

any freight charges payable, as is stipulated in this case (A4a, paragraph 10).

It is respectfully submitted for the foregoing reasons that the judgment below should be affirmed.

Respectfully submitted,

ROY C. COLLINS,
Attorney for Defendant.

FILED
MAR 29 1951
CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1950

No. 583

WHEATON BRASS WORKS, a corporation of the State of New Jersey,

Petitioner,

against

SOUTHERN PACIFIC COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

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No. 583

WHEATON BRASS WORKS, a corporation of the State of New Jersey,
Petitioner,

against

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, Southern Pacific Company, submits the following brief in opposition to the petition for writ of certiorari heretofore filed in this Court.

Grounds of Jurisdiction.

Petitioner invokes the jurisdiction of this Court under Title 28, U. S. C. A., Secs. 1257(3) and 2101(c). The right of the respondent rail carrier under the Interstate Commerce Act [1] to collect from the consignee filed tariff charges on an interstate shipment accepted by the consignee was sustained below by the Supreme Court of New Jersey.

[1] Title 49, U. S. C. A., Secs. 1-27.

Petitioner's claim seems to be that a New Jersey common law rule, providing that a consignee accepting delivery of a shipment is not liable for freight charges where the cerrier advises it that the charges have been paid, should relieve the petitioner from liability for the charges sued for below, despite the requirements of the bill of lading and of Sec. 6(7) of the Interstate Commerce Act. The bill of lading specifically makes the consignee liable for the filed tariff charges. Sec. 6(7) of the Interstate Commerce Act provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation * * * than the rates * * * specified in the tariff filed and in effect at the time".

Respondent submits that this Court should decline to exercise its discretion to review the judgment below, since the decision sought to be reviewed (a) is clearly in accord with the applicable decisions of this Court and (b) decides no questions not heretofore determined by this Court.

The Facts.

Petitioner's statement of the facts is substantially correct[2] and will not be repeated herein. However, respondent points out that the "uniform straight bill of lading" (R. 8A) approved by the Interstate Commerce Commission,[3] under which the shipment moved, contained the following clause (R. 9):

> "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property * * *."

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[2] Petition, pages 4-8.

[3] In the Matter of Bills of Lading, 52 I. C. C. 671; 64 I. C. C. 357.

Question Presented.

Whether the consignee who accepts delivery of an interstate shipment with knowledge that it actually consisted of iron, steel and brass, is liable for the difference between the filed tariff rate for such goods and the lower rate for iron and steel only, the shipment having been misdescribed by the shipper in the bill of lading as iron and steel, and prepaid at the lower erroneous rate, where the consignee had refused to accept the shipment until assured that the freight had been prepaid and had changed his position in reliance on such representation.

Argument.

The argument will be addressed to the question of whether the case presented by the record is one in which this Court should exercise its discretionary power to grant a writ of certiorari. Respondent's position is that the Supreme Court of New Jersey decided the case below in accordance with this Court's decision in *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink,* 250 U. S. 577, which is controlling on the facts involved herein.

POINT I.

Liability for freight charges on an interstate shipment is governed solely by the uniform bill of lading and by federal law, *i. e.*, the Interstate Commerce Act, which exclusively occupies the field.

Petitioner's contention that a local common law rule operates to relieve a consignee accepting a shipment from liability for the tariff charges despite the bill of lading provision cannot be sustained. This Court has consistently

held that the obligations imposed by the Interstate Commerce Act on all common carriers engaged in interstate commerce to collect the lawful tariff charges, and on the consignors, consignees and owners of interstate shipments to pay such charges, must prevail over conflicting rules of common law or of state statute.

> *Illinois Steel Co.* v. *Baltimore & Ohio R. Co.*, 320 U. S. 508 (1944);
> *Louisville & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59 (1924);
> *York & Whitney* v. *New York Central & H. R. R. Co.*, 256 U. S. 406 (1921);
> *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink*, 250 U. S. 577 (1919).

In *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink, supra,* this Court said in regard to the liability of a consignee to pay freight charges on an interstate shipment, of which he had accepted delivery:

> "* * * in our view the question must be decided upon consideration of the applicable provisions of the statutes of the United States regulating interstate commerce."

Pursuant to Congressional authority, the Interstate Commerce Commission prescribed uniform forms of bills of lading, including that involved in this case, and has held that the prescribed forms are reasonable.

> *In the Matter of Bills of Lading*, 52 I. C. C. 671 (1919); 64 I. C. C. 357 (1921).

This Court recently stated in *Illinois Steel Co.* v. *Baltimore & Ohio R. Co., supra:*

> "Since the clauses of the uniform bill of lading govern the rights of the parties to an interstate ship-

ment and are prescribed by Congress and the Commission in the exercise of the commerce power, they have the force of federal law and questions as to their meaning arise under the laws and Constitution of the United States."

The field is thus completely occupied by federal law to the exclusion of any claimed state statutes or common law rules. Any decisions applying state law are thus entirely inapplicable to any question of the collectibility of charges on an interstate shipment.

Gulf, Colorado & Santa Fe Ry. Co. v. *Hefley*, 158 U. S. 98 (1895).

POINT II.

Section 6(7) of the Interstate Commerce Act, which forbids discrimination or preferences by rail carriers, compels them to collect the full lawfully filed tariff charges on interstate shipments from a person liable therefor.

It may be thought a hardship to sustain the collection of the unpaid tariff charges from the consignee here who accepted the shipment with the carrier's assurance that the charges had been prepaid. But individual cases of hardship must bow to the paramount purpose of the law.

In order to eliminate every possible form of discrimination in interstate transportation, Congress has, by Sec. 6(7) of the Interstate Commerce Act,[4] forbidden both intentional as well as unintentional deviations from the predetermined schedule of rates filed with the Interstate Commerce Com-

[4] Title 49, U. S. C. A., 6(7).

mission. The absolute obligation of the carrier to collect and the parties liable therefor to pay the freight charges on an interstate shipment is set forth in this section of the Act:

> "No carrier, * * * shall engage * * * in the transportation of * * * property, * * * unless the rates, * * * and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; *nor shall any carrier charge or demand or collect or receive a greater or less or different compensation* for such transportation of * * * property, * * * between the points named in such tariffs than the rates, * * * and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, * * * and charges so specified, * * *." (Italics ours.)

This Court, in interpreting the effect of Section 6(7), has held that the carrier has a lien for the lawful tariff charge and that the consignee, by the act of accepting the shipment, thereby assumes the obligation of discharging the lien. This Court has often ruled that this obligation on the part of the consignee could not be avoided on the ground that it imposed a hardship on the consignee, or that the consignee had relied upon the erroneous assumption or advice that the charges had been paid and accordingly changed its position to its detriment.

Louisville & N. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59 (1924);

York & Whitney v. *New York Central & H. R. R. Co.*, 256 U. S. 406 (1921);

Pittsburgh, C. C. & St. L. R. Co. v. *Fink*, 250 U. S. 577 (1919).

In *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink,* 250 U. S. 577, this Court, in holding a consignee liable to pay lawful additional filed tariff charges which the carrier had failed to demand at the time of acceptance of the shipment by the consignee, said:

> "This may be in the present as well as some other cases a hardship upon the consignee due to the fact that he paid all that was demanded when the freight was delivered; but *instances of individual hardship cannot change the policy* which Congress has embodied in the statute in order to secure uniformity in charges for transportation." (Italics ours.)

The policy of preventing discrimination which Congress has embodied in the Interstate Commerce Act, has been repeatedly recognized by this Court as of more importance than the hardships resulting in individual cases. Thus, in *Louisville & Nashville R. R. Co.* v. *Maxwell,* 237 U. S. 94 (1915), this Court said:

> "Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Moreover, it has been stated that the liability imposed by the federal law *cannot be contracted away* by the carrier.

> *York & Whitney Co.* v. *New York Central & H. R. Co.* 256 U. S. 406 (1921);
>
> *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson,* 233 U. S. 173 (1914);
>
> *Texas & Pacific Railway Co.* v. *Mugg,* 202 U. S. 242 (1906).

POINT III.

The carrier is under no obligation to proceed first against the consignor since the consignee is primarily liable for the charges.

Petitioner makes the contention that the respondent should have endeavored to collect the unpaid charges here from the shipper instead of the consignee. No authority is given for any such obligation on the carrier, and the cases uniformly hold there is none.

The consignee is primarily liable and the carrier may proceed directly against it if it refuses to pay, without first taking any action against the shipper.

Atchison, Topeka & Santa Fe Ry. Co. v. *Hunt Bros.*, 34 Fed. (2d) 582 (D. C. W. D. Mo., 1929);

Western & Atlantic R. Co. v. *Underwood*, 281 Fed. 891 (D. C. N. D. Ga., 1922);

Boston & Maine R. R. v. *Hannaford Bros. Co.*, 68 A. (2d) 1 (1949);

Long Island R. Co. v. *Midland Valley Lumber Co.*, 237 Mo. App. 147, 164 S. W. (2d) 930 (1942), (Rehearing Denied);

New York Central R. Co. v. *Federal Sugar Refining Co.*, 235 N. Y. 182, 139 N. E. 229 (1923).

The payment of a *part* of the correct, lawful charges by the shipper did not fulfill or release performance by the consignee of his contract. The consignee was charged with full knowledge that the lawful rate was that set forth in the tariffs filed with the Interstate Commerce Commission. Consequently, the consignee is held as a matter of law, to

have agreed, by accepting the goods, to pay the full lawful charges.

York & Whitney v. *New York Central & H. R. R. Co.*, 256 U. S. 406 (1921);
Pittsburgh, C. C. & St. L. R. Co. v. *Fink*, 250 U. S. 577 (1919);
Pennsylvania R. R. Co. v. *Titus*, 216 N. Y. 17, 109 N. E. 857 (1915).

POINT IV.

The decision of the New Jersey Supreme Court is in accord with the applicable decisions of this Court and the question decided has previously been determined by this Court.

Petitioner's contentions that the case was decided below contrary to the reasoning of applicable decisions of this Court, and that this Court has not passed on the question presented below, are without foundation. The instant case was decided below on the theory that there was an absolute duty on the part of the consignee accepting the shipment to pay the full filed tariff charges, irrespective of whether the carrier had erroneously advised the consignee on delivery that the charges had been fully paid. Such decision is not only in accord with the reasoning of, but is on all fours with the prior decisions of this Court.

The fact situation in the case at bar is indistinguishable from that in *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink*, 250 U. S. 577. In that case the carrier delivered merchandise to the consignee upon the payment by the latter of $15.00, the amount of charges demanded by the carrier. The tariff rates filed with the Interstate Commerce Commission so

classified the merchandise that the lawful charges should have been $30.00. Suit was instituted by the carrier for the difference. Recovery was allowed on the theory that the consignee was presumed to know the filed tariff rate on the commodity shipped and that the filed tariff rate was the only rate which could lawfully be collected. This Court held that the carrier had a lien on the goods for the amount of the lawfully filed tariff charges, which could only be discharged by the payment of such charges. The basis of the decision was stated by Mr. Justice Day at page 581:

> "* * * The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier turned over the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances consistently with the provisions of the Interstate Commerce Act the consignee was only entitled to the merchandise when he paid for the transportation thereof the amount specified as required by the statute. *For the legal charges the carrier had a lien upon the goods, and this lien could be discharged and the consignee become entitled to the goods only upon tender or payment of this rate.* Texas & Pacific Ry. Co. v. Mugg, 202 U. S. 242. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. *This may be in the present as well as some other cases a hardship upon the consignee, due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship can-*

not change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation." (Italics ours.)

It was further pointed out in the *Fink* case that the defendant could not raise the defense of estoppel by reason of the failure of the carrier to demand the correct charges at the time of delivery, as "Estoppel could not become the means of successfully avoiding the requirement of the Act as to legal rates in violation of the provisions of the statute."

The principle fixing the liability of the consignee, as established in the *Fink* case, has been consistently followed by this Court and by numerous state and lower federal courts.

Illinois Steel Co. v. *Baltimore & Ohio R. Co.*, 320 U. S. 508 (1944);

Louisville & N. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59 (1924);

York & Whitney v. *New York Central & H. R. R. Co.*, 256 U. S. 406 (1921);

F. Burkhart Mfg. Co. v. *Fort Worth & D. C. Ry. Co.*, 149 Fed. (2d) 909 (C. C. A. 8, 1945);

Central Warehouse Co. v. *Chicago, R. I. & P. Ry. Co.*, 14 Fed. (2d) 123 (D. C. Minn.), aff'd 20 Fed. (2d) 828 (C. C. A. 8, 1927);

Western & Atlantic R. Co. v. *Underwood*, 281 Fed. 891 (D. C. N. D. Ga., 1922);

Great Northern Ry. Co. v. *Hyder*, 279 Fed. 783 (D. C. W. D. Wash. S. D., 1922);

Boston & Maine R. R. Co. v. *Hannaford Bros. Co.*, 68 A. (2d) 1 (1949);

Houston & T. C. R. Co. v. *Johnson*, 41 S. W. (2d) 14 (1931);

N. Y. N. H. & H. R. Co. v. *Lord & Spencer,* 273 Mass. 583, 174 N. E. 179 (1931);
New York Central R. R. Co. v. *Stanzeale,* 105 N. J. L. 593, 147 A. 457 (1929);
Norfolk & Western Ry. Co. v. *Williamson Grocery Co.,* 103 W. Va. 532, 138 S. E. 102 (1927);
Chicago & N. W. Ry. Co. v. *Case Plow Works,* 173 Wis. 237, 180 N. W. 846 (1921);
Pennsylvania R. R. Co. v. *Titus,* 216 N. Y. 17, 109 N. E. 857 (1915).

The rule governing the *Fink* case and the case at bar was recognized in *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U. S. 516 (1939), rehearing denied:

> "This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates."

The petitioner contends that its liability must be predicated on a contract with the carrier to pay the shipping charges. Petitioner says that in the present case it had informed the carrier, prior to its acceptance of the goods, that the shipping charges were supposed to have been paid by the shipper and that it, the consignee, would not assume liability therefor. It says that thus there was no contract by the consignee to pay the charges and hence no liability on its part. The *Fink* case, however, is clear authority that no contract is required to charge the consignee with liability for the correct charges.

It may be argued that the *Fink* case differs from the case at bar in that in the former case there was merely a mutual

mistake as to the correct charges, whereas in the present case there was a definite agreement by the carrier not to collect any additional charges. However, under the reasoning of the *Fink* case and of *Illinois Steel Co.* v. *Baltimore & Ohio R. Co.*, 320 U. S. 508, the carrier *could not legally agree* not to collect any unpaid tariff charges from the consignee. It could not estop itself from collecting from the consignee the charges that were lawfully owing on the shipment and which it had not collected because of the consignor's misdescription of the goods, nor could the carrier be deprived of its lien by making delivery of the shipment.

The case of *Louisville & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, on which petitioner's main reliance seems to be based, does not in any way support its position. That case involved a suit by a carrier against a coal company, which had delivered coal to the carrier for shipment, for the difference between the amount of charges originally incorrectly computed and paid by the consignee and the proper amount which was legally payable. The bill of lading in that case, as here, stated that the charges should be paid by the owner or the consignee. The Court considered the bill of lading as the contract and decided that the *shipper, i. e.*, the coal company, which had merely delivered the coal for shipment and had *not signed the bill of lading* and was *not the consignor or owner or the party for whose benefit the shipment was made*, was not liable for the unpaid charges. Mr. Justice BRANDEIS, speaking for the Court, said that the Interstate Commerce Act did not impose an absolute obligation upon a *shipper* to pay the freight charges, and that the carrier and *shipper* "were left free to contract, subject to the rule which prohibits discrimination". But in concluding his opinion, Mr. Justice BRANDEIS pointed out that this *did not relieve the consignee*

from full liability for the charges on a shipment accepted by him:

> "For, under the rule of the Fink case, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, *whether they are demanded at the time of delivery, or not until later.* His liability satisfies the requirements of the Interstate Commerce Act." (Italics ours.)

The rule of the foregoing case appears to be that while the shipper has, under the form of the bill of lading therein, some latitude in limiting his liability by his contractual undertaking, nevertheless, "if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges". The *Central Iron & Coal Co.* case has been subsequently construed by this Court and the lower federal courts to impose an absolute liability on the consignee resulting from the acceptance of the goods.

Illinois Steel Co. v. *Baltimore & Ohio R. Co.*, 320 U. S. 508 (1944);

Louisville & Nashville R. R. v. *United States*, 267 U. S. 395 (1925);

F. Burkhart Mfg. Co. v. *Fort Worth & D. C. Ry. Co.*, 149 Fed. (2d) 909 (C. C. A. 8, 1945);

Central Warehouse Co. v. *Chicago, R. I. & P. Ry. Co.*, 14 Fed. (2d) 123 (D. C. Minn.), aff'd 20 Fed. (2d) 828 (C. C. A. 8, 1927).

Conclusion.

In conclusion, it is submitted that this application for a writ of certiorari should be denied as the decision of the New Jersey Supreme Court is in accord with the federal statute and with the applicable decisions of this Court on a question previously decided by this Court.

Respectfully submitted,

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